

**THE BANK OF THE PHILIPPINE ISLANDS, PLAINTIFF AND APPELLEE,
VS. B. A. GREEN., ORETHA K. O'BRIEN, AND S. W.
O'BRIEN, AS GUARDIAN OF THE MINORS, WILLIAM KEISTER
O'BRIEN ET AL., DE...**

G. R. No. 35125. December 12, 1932

Ponente: BUTTE, J.

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BUTTE, J.:

On February 13, 1929, the Bank of the Philippine Islands filed a petition in the Court of First Instance of Rizal against the defendants-appellants to recover against the defendant-appellant Green the sum of P68,616.46 with interest and attorneys' fees and to foreclose a mortgage upon real estate situated in the Province of Rizal given by the said Green in favor of said bank. The defendants O'Brien were made parties to the action on the allegation that they were holders of a second mortgage covering the same lands.

The defendant Green filed a general denial and a special defense alleging in substance that the indebtedness consisting of an overdraft in the sum of P50,000, for which said mortgage was given as security, was fully paid and liquidated by two promissory notes in the sum of P57,900 executed and delivered on August 9, 1921; that as a consequence thereof said mortgage was satisfied and extinguished; and Green confessed judgment for the sum of P70,848.94.

The defendants O'Brien set up special defenses in substance as follows: That the said mortgage had already been foreclosed in civil case No. 24594 of the Court of First Instance of Manila and plaintiff cannot maintain two actions for the foreclosure of one and same mortgage; that Green's debt secured by said mortgage has been liquidated and the mortgage satisfied, thus leaving O'Brien's mortgage as a first lien; that the bank, by requesting the sale of a part only of the lands covered by the judgment of foreclosure in said case No. 24594, waived all right to the sale of the rest.

The plaintiff bank thereupon filed a reply to said answers, alleging that the special defense raised by Green is res judicata, having been determined in the said suit in the Court of First Instance of Manila; and denying that there was any novation of the debt on August 9, 1921, as claimed by the defendants.

The prayer of the petition is that a receiver be appointed; that the plaintiff have judgment against Green for the sum of P68,616.46 with interest at 9 per cent from January 16, 1929; and if not paid within 90 days, that public sale of the mortgaged lands located in Rizal be made; second, that whatever right, interest or participation the other defendants as second mortgagees may have, should be declared extinguished in case they should not exercise their right of redemption.

For the better understanding of the issues, so far as we intend to decide them in this case, the following facts are pertinent:

On April 19, 1921, B. A. Green, the defendant, executed and delivered to the Bank of the Philippine Islands

the mortgage here in question, which covered eight parcels of land, one in the City of Manila and the rest in the Province of Rizal, all with Torrens titles, to secure a credit (overdraft) not to exceed P50,000. On August 9, 1921, Green delivered to the bank two notes, Exhibits C and D, for P15,300 and P42,600 respectively. On August 25, 1921, Green gave S. W. O'Brien, administrator of the estate of C. W. O'Brien, a mortgage covering the same lands, which was duly registered in the offices of the registers of deeds of Manila and Rizal on the 12th day of November, 1921, as security for a debt of P35,175.02. On June 14, 1923, the said bank commenced civil case No. 24594 in the Court of First Instance of Manila against the defendant Green, for judgment on said two promissory notes and for the foreclosure of the said mortgage of April 19, 1921. Although the bank had both actual and constructive knowledge of said mortgage to O'Brien, it did not make the mortgagee a party to the suit, as required by section 255 of the Code of Civil Procedure. The litigation continued merrily in the Court of First Instance of Manila and has already been before this court for review on three appeals. (Cf. 48 Phil., 284 and 52 Phil., 491.) The plaintiff bank finally obtained a personal judgment against Green for the amount of said notes and a decree of foreclosure of the mortgage of April 19, 1921, both as to the lot situated in Manila and the seven lots situated in Rizal. On application of the bank, the lot in Manila was sold under said foreclosure. It was bid in by the plaintiff bank for P25,000, which was credited on the amount of the judgment against Green in said case No. 24594.

The bank now asks in this new suit, filed in the Court of First Instance of Rizal on February 13, 1929, for a personal judgment against Green for the balance remaining unpaid on the said judgment in case No. 24594 of the Court of First Instance of Manila, and asks for the foreclosure of the same mortgage but only as to the lands in the Province of Rizal. The case was heard by Judge Enage who rendered judgment for the defendants on April 25, 1930. On May 31, 1930, Judge Zanduetta denied a motion for new trial. On June 10, 1930, a second motion for new trial was filed by the plaintiff and this was granted by Judge Lukban on July 1, 1930. After the presentation of additional evidence by the plaintiff, the latter judge, on October 28, 1930, reversed the decisions of the former judges and rendered judgment in favor of the bank and against the defendant Green for the sum of P68,616.45 with interest, attorneys' fees and costs, and if not paid within 90 days from the date of the decision, ordering; the public sale such of the lands covered by the said mortgage as are situated in the Province of Rizal. All relief prayed for in the petition against the defendants O'Brien was denied. Both Green and the defendants O'Brien filed their exceptions and motions for new trial which were denied and the appeals lodged in this court.

The appellants O'Brien make the following assignments of error:

"I. The trial court erred in holding that the indebtedness of P68,616.43, was secured by the mortgage Exhibit B and in not declaring that said mortgage has been extinguished and cancelled, because the obligation secured by the same was fully paid.

"II. The trial court erred in not dismissing this case, because the appellee has forfeited and lost its rights to bring this action for the foreclosure of the mortgaged properties situated in Rizal Province.

"III. The trial court erred in not holding that the case is res adjudicata.

"IV. The trial court erred in granting the motion for new trial presented by the plaintiff and in reopening the case to allow said plaintiff to present additional evidence.

"V. The trial court erred in denying the motion for new trial presented by the appellants O'Brien and in not rendering judgment as prayed for in their amended answers."

In the view that we take of this case, we do not deem it necessary or proper at this time to determine the questions raised by the first and second assignments of error; nor is the fourth assignment of error material.

The Court of First Instance of Manila in case No. 24594 had jurisdiction to enter a decree of foreclosure, as it did, of the mortgage covering the lands in both Manila and Rizal. (See section 254 of the Code of Civil Procedure.)

The Court of First Instance of Rizal should have declined to render a second judgment upon the same obligation and a second foreclosure of the same mortgage, and should have dismissed the petition, when it was convinced the plaintiff was entitled to no relief against the defendants O'Brien. It is difficult for us to figure out upon what theory this irregular and improper suit was brought in the court of Rizal. If its object was to implead the O'Briens who had been intentionally or negligently omitted as parties in case No. 24594 in the Court of First Instance of Manila, their rights might have been determined by a timely supplemental action in the Manila court. (Cf. *Sun Life Assurance Co. of Canada vs. Gonzalez Diez*, 52 Phil., 271.) It is to be noted also that the bank took no exception to the decision below denying it any relief against the O'Briens.

The appellant Green has recently filed a motion to dismiss his appeal, which we do not grant because it was filed to prejudice his co-appellants and it is of no advantage to the appellee. We think it to the interest of all parties and conducive to orderly procedure to enter a clear-cut reversal of the judgment appealed, from, with directions to dismiss the petition at the cost in both instances of the appellee, but without prejudice in any proceedings that may be legally instituted in the proper tribunal for the final adjudication of the respective claims of the parties. So ordered.

Avanceña, C. J., Street, Malcolm, Villamor, Villa-Real, Abad Santos, Hull, Vickers, and Imperial, JJ., concur.

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